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AF

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES**

App. No. : 09/611,622
Applicants : Meckenstock et al.
Filed : July 7, 20000
Art Unit : 2194
Examiner : Lechi Truong
Docket No. : B-67587 (014354/0003)
Customer No. : 33649

Confirmation No. 6467

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
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Joan B. Farragher

ATTENTION: Board of Patent Appeals and Interferences

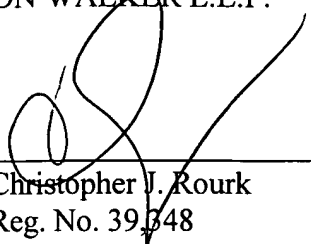
TRANSMITTAL OF APPEAL BRIEF

In response to the Notification of Non-Compliance with the Requirements of 37 CFR 41.37, enclosed is the substitute Appellant's Brief. A check in the amount of \$500.00 was filed with the original Appellant's Brief on April 24, 2006. This Appellant's Brief is timely filed within the 30-day period set forth with the mailing of the Notification on July 24, 2006. Therefore, no fees are believed due with the filing of this substitute Appellant's Brief; however, the Commissioner is hereby authorized to charge any additional fee or credit any refund to the deposit account of Jackson Walker L.L.P., No. 50-1752.

Dated: 8/17/00

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8/17/06
Joan B. Paragher
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ATTENTION: Board of Patent Appeals and Interferences

APPELLANT'S BRIEF (37 C.F.R. 41.37(c))

This brief is in furtherance of the Notice of Appeal, filed in this case on February 20, 2006 and the Final Office Action mailed October 18, 2005.

The fees required under § 41.20(b)(2), and any required petition for extension of time for filing this brief and related fees are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

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The final page of this brief bears the practitioner's signature.

I. REAL PARTIES IN INTEREST (37 C.F.R. §41.37(c)(i))

The real party in interest in this appeal is:

☒ the following party:

Paymentech, L.P., Inc. by an assignment from the Inventors to Banc One Payment Services, L.L.C. recorded at Reel 011370, Frame 0275 on 12/6/2000; an assignment from Banc One Payment Services, L.L.C. to BOPS Holdings, L.L.C. and PTI General Partner, L.L.C. recorded at Reel 013228, Frame 0124 on August 28, 2002; and from BOPS Holdings, L.L.C. and PTI General Partner, L.L.C. to Paymentech, L.P. recorded at Reel 013527, Frame 0849 on November 26, 2002.

II. RELATED APPEALS AND INTERFERENCES

(37 C.F.R. §41.37(c)(ii))

With respect to other appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in the pending appeal:

4 ☒ there are no such appeals or interferences.

III. STATUS OF CLAIMS (37 C.F.R. §41.37(c)(iii))

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 20

B. STATUS OF ALL THE CLAIMS IN APPLICATION

1. Claims rejected: Claims 1 through 4 and 7 through 22.

C. CLAIMS ON APPEAL

The claims on appeal are: Claims 1 through 4 and 7 through 22.

IV. STATUS OF AMENDMENTS (37 C.F.R. 41.37(c)(iv))

No amendments have been submitted subsequent to the final rejection of the claims.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

(37 C.F.R. 41.37(c)(v))

Claim 1 pertains to a system for programming point of sale devices that includes device programming means for programming a plurality of point of sale devices (Fig. 2, Fig. 4 and Fig. 5 and accompanying text at page 17, line 15 to page 20, line 32, and page 23, line 27 to page 29, line 17). Communications interface means coupled to the device programming system receives update requests from the plurality of devices (Fig. 1, Fig. 4 and Fig. 5 and accompanying text at page 9, line 23 through page 10, line 15 and page 23, line 27 to page 29, line 17). The plurality of devices includes devices having proprietary operating systems from two or more different manufacturers.

Claim 2 includes the system of claim 1 wherein the device programming means further comprises device update file means for each of the plurality of point of sale devices (Fig. 1, Fig. 4 and Fig. 5 and accompanying text at page 9, line 23 through page 10, line 15 and page 23, line 27 to page 29, line 17).

Claim 3 includes the system of claim 1 wherein the device programming means further comprises device update file means for each of a plurality of classes of point of sale devices (Fig. 1, Fig. 4 and Fig. 5 and accompanying text at page 9, line 23 through page 10, line 15 and page 23, line 27 to page 29, line 17).

Claim 4 includes the system of claim 1 wherein the device programming means further comprises polling means for polling each of the point of sale devices (Fig. 1, Fig. 4 and Fig. 5 and accompanying text at page 9, line 23 through page 10, line 15 and page 23, line 27 to page 29, line 17).

Claim 7 includes the system of claim 1 wherein the device programming means further comprises device setup means for setting the plurality of point of sale devices for use (Fig. 1, Fig. 4 and Fig. 5 and accompanying text at page 9, line 23 through page 10, line 15 and page 23, line 27 to page 29, line 17).

Claim 8 includes the system of claim 1 wherein the device programming means further comprises device update means operable to provide configuration data updates to the plurality of point of sale devices (Fig. 1, Fig. 4 and Fig. 5 and accompanying text at page 9, line 23 through page 10, line 15 and page 23, line 27 to page 29, line 17).

Claim 9 includes the system of claim 1 wherein the device programming means further

comprises device analytical means for performing troubleshooting for the plurality of point of sale devices (Fig. 1, Fig. 4 and Fig. 5 and accompanying text at page 9, line 23 through page 10, line 15 and page 23, line 27 to page 29, line 17).

Claim 10 includes a method for programming point of sale devices comprising receiving a programming request for a point of sale device, determining which of two or more proprietary operating systems is used by the point of sale device, and transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 11 includes the method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a device setup command from the point of sale device (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 12 includes the method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a device update command from the point of sale device (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 13 includes the method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a polling command from a device update controller (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 14 includes the method of claim 10 wherein determining which of two or more proprietary operating systems is used by the point of sale device comprises retrieving a file associated with the point of sale device (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 15 includes the method of claim 10 wherein transmitting the programming request to the point of sale device based on the operating system comprises transmitting the programming request over a public switched telephone network (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 16 includes the method of claim 10 wherein transmitting the programming request to the point of sale device based on the operating system comprises transmitting the programming request over an Internet (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 17 includes a method for managing a plurality of point-of-sale devices comprising storing a file for each of a plurality of operating systems, where any of the operating systems can

be associated with one or more of each point of sale device, each file containing device operating commands, retrieving one of the files in response to a programming request for a corresponding device after an operating system for the corresponding device has been determined, and transmitting the file to the corresponding device (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 18 includes the method of claim 17 wherein storing the file for each of a plurality of operating systems comprises creating two or more classes of files for the point of sale devices based upon the proprietary operating systems used by the point of sale devices, creating at least one class of rules for the point of sale devices based upon the users of the point of sale devices, applying the class of rules to the two or more classes of files, and storing each file for each point of sale device (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 19 includes the method of claim 17 wherein retrieving one of the files in response to the programming request for the corresponding device comprises extracting a point of sale device identifier from the programming request, locating a data file associated with the point of sale device identifier, and retrieving the data file (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 20 includes the method of claim 17 wherein retrieving one of the files in response to the programming request for the corresponding device further comprises receiving the programming request from the point of sale device (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 21 includes the method of claim 10 wherein transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device further comprises selecting a template for the point of sale device and imposing configuration constraints on the templates based upon a type of credit card that is used at the point of sale device (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

Claim 22 includes the method of claim 10 wherein transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device further comprises determining that a change in a business entity has occurred for a point of sale device, selecting a template for the point of sale device, determining whether to modify the template to include changing a telephone number for the point of sale device based on the

change in business entity, determining whether to modify the template to include changing a list of allowable cards based on the change in business entity, determining whether to modify the template to include changing a merchant number based on the change in business entity, determining whether to modify the template to include changing an address based on the change in business entity, determining whether to modify the template to include enabling program modules based on the change in business entity, determining whether to modify the template to include disabling program modules based on the change in business entity, determining whether to modify the template to include enabling loyalty card programs based on the change in business entity, determining whether to modify the template to include disabling loyalty card programs based on the change in business entity, determining whether to modify the template to include enabling frequent buyer card features based on the change in business entity, determining whether to modify the template to include disabling frequent buyer card features based on the change in business entity, determining whether to modify the template to include modifying authorization host features in response to call swipes based on the change in business entity, and determining whether to modify the template to include modifying credit card reversal of transaction features based on the change in business entity (Fig. 4 and Fig. 5 and accompanying text at page 23, line 27 to page 29, line 17).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**(37 C.F.R. §41.37(c)(vi))**

1. Whether the Examiner has failed to apply controlling Federal Circuit precedent in construing Claims 1 through 4 and 7 through 9 to reject claim 1 under 35 U.S.C. § 103(a) over U.S. Patent 6,338,149 (Ciccone) in view of U.S. Patent No. 6,098,098 (“Sandahl”), claims 2 and 7 through 9 under 35 U.S.C. § 103(a) over Ciccone in view of Sandahl and further in view of U.S. 6,643,626 (“Resende”), claim 3 under 35 U.S.C. § 103(a) over Ciccone in view of Sandahl and further view of AN (IEE OPOS (USPOS)* Compatible Pole Display Software), and claim 4 under 35 U.S.C. § 103(a) over Ciccone in view of Sandahl and further in view of U.S. 5,500,890 (“Rogge”).

2. Whether the Examiner has properly construed claims 10 and 14 in rejecting them under 35 U.S.C. § 102(e) as being anticipated by Ciccone.

3. Whether the Examiner has properly construed claims 11 and 12 in rejecting them under 35 U.S.C. § 103(a) over Ciccone in view of Sandahl.

4. Whether the Examiner has properly construed claim 13 in rejecting it under 35 U.S.C. § 103(a) over Ciccone in view of Rogge.

5. Whether the Examiner has properly construed claims 15 and 16 in rejecting them under 35 U.S.C. § 103(a) over Ciccone in view of Resende.

6. Whether the Examiner has properly construed claim 17 in rejecting it under 35 U.S.C. § 103(a) over Ciccone in view of U.S. 4,999, 766 (“Peters”).

7. Whether the Examiner has properly construed claims 18 and 22 in rejecting them under 35 U.S.C. § 103(a) over Ciccone and further in view of Peters and further in view of Resende.

8. Whether the Examiner has properly construed claims 19 and 20 in rejecting them under 35 U.S.C. § 103(a) over Ciccone in view of Peters and further in view of U.S. 6,311,165 (“Coutts”).

9. Whether the Examiner has properly construed claim 21 in rejecting it under 35

U.S.C. § 103(a) over Ciccone in view of Peters, in view of Resende, and further in view of Admitted Prior Art.

VII. ARGUMENT (37 C.F.R. 41.37(c)(vii))

1. The Examiner has failed to apply controlling Federal Circuit precedent in construing Claims 1 through 4 and 7 through 9.

Claim construction is a question of law, and is reviewed *de novo*. *Markman v. Westview*, 52 F. 3d 967, 34 USPQ2d 1321 (Fed. Cir. 1995), *aff'd* 116 S.Ct. 1384 (1996). The Examiner makes a critical failure in the construction of claims 1 through 4 and 7 through 9 – absolutely no analysis of the claimed means plus function elements is provided. Under controlling Federal Circuit precedent, a means plus function clause invokes 35 U.S.C. 112, paragraph 6, the corresponding structure must be identified in the specification of the pending application, and that structure or an equivalent thereof must be identified in the prior art. *See, e.g., WMS Gaming, Inc. v. Int'l Game Technology*, 184 F.3d 1339, 1349 (Fed. Cir. 1999), which holds that:

In a means-plus-function claim in which the disclosed structure is a computer, or microprocessor, programmed to carry out an algorithm, the disclosed structure is not the general purpose computer, but rather the special purpose computer programmed to perform the disclosed algorithm. The “special purpose computer” results from the computer being “programmed to perform particular functions pursuant to instructions from program software.” *Id.* at 1348.

See also M.P.E.P. 2182-83. The Examiner has utterly failed to not only identify the disclosed structure in the pending application, but also to identify whether that disclosed structure or any equivalent thereof is present in the cited prior art. While this may be attributed to an oversight by the Examiner, it is in fact apparent that the Examiner would have failed to perform this analysis in any event because the corresponding structure disclosed in the specification or any equivalent thereof are entirely missing from the cited prior art.

For example, claim 1 includes device programming means for programming a plurality of point of sale devices (see, e.g., Fig 4, Fig. 5 and specification at page 23, line 27 to page 29, line 16). As noted by the Federal Circuit, the structure corresponding to this means plus function element is the special purpose computer programmed to perform the particular functions pursuant to instructions from program software set forth in these flow charts. However, the Examiner has utterly failed to even address the invocation of 35 U.S.C. 112, paragraph 6 in these

claims by first identifying the corresponding structure in the specification and then identifying any structure in the cited art that is allegedly identical or equivalent to the structure disclosed in the specification, as required by M.P.E.P. 2181. The Applicants note that this requirement was specifically identified in the response mailed August 2, 2005 at page 13, which was apparently ignored by the Examiner.

Applicants reserve the right to address any arguments presented by the Examiner in response to this point of appeal, but as the Examiner has failed to even address the means plus function elements in the final rejection, it would be improper for the Examiner to raise such new grounds of rejection for the first time on appeal, and that the Board must **REVERSE** the rejection of claims 1 through 4 and 7 through 10.

2. Ciccone fails to anticipate claims 10 and 14 under 35 U.S.C. § 102(e) when it is properly construed.

The construction of claims 10 and 14 adopted by the Examiner is incorrect, and is used to improperly reject claims 10 and 14 over Ciccone. Claim construction is a question of law, and is reviewed *de novo*. *Markman v. Westview*, 52 F. 3d 967, 34 USPQ2d 1321 (Fed. Cir. 1995), *aff'd* 116 S.Ct. 1384 (1996).

Claim 10 includes a "method for programming point of sale devices comprising receiving a programming request for a point of sale device, determining which of two or more proprietary operating systems is used by the point of sale device, and transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device." In rejecting claim 10, the Examiner states that Ciccone teaches receiving a programming request (col. 1, lines 27-32) and checking "the platform and products of the computer system 4 to determine whether they are match [sic] the stored templates 28, 30, col. 3, ln 43-48/col. 12, line 6, col. 2, lines 27-37, col. 5, lines 16-65) and transmitting a programming request to the point of sale device based on the proprietary operating system used by the point of sale device (col. 3, lines 4-46, col. 12, lines 22-40). However, those numerous sections of Ciccone only state that the "monitoring node 22 periodically checks the platforms and products of the computer system 4 to determine whether they match the stored template." There is simply nothing at all in Ciccone that even remotely suggests that a programming request, as properly construed, is received for a point of sale

device. A programming request is different from a determination whether “the platform and products of the computer system 4 . . . match the stored templates” – the programming request must originate from somewhere other than where the determination is made. The Examiner has misconstrued claim 10 so as to eliminate the need for receiving a programming request for a point of sale device – a point which the Examiner admits on page 6 of the Office Action mailed October 18, 20005, at page 6, paragraph 23, in response to the rejection of claim 11! As such, resources at the monitoring system 2 of Ciccone must be used to periodically monitor each of a large number of point of sale devices, instead of limiting the need to periodically monitor each point of sale device by only requiring a response to a programming request.

Furthermore, as detailed in the analysis in the response to the Office Action mailed April 27, 2005, at pages 14-16, Ciccone fails to suggest or disclose “transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device.” Instead, Ciccone uses a file template for each platform, such that the programming request (which is never received in the system of Ciccone) is transmitted based on the file template for each platform, and not based on the operating system. Likewise, while claim 14 includes that determining which of two or more proprietary operating systems is used by the point of sale device comprises retrieving a file associated with the point of sale device, such retrieving of the file does not include a determination of the operating system. In accordance with Ciccone, there might be only one operating system, or each device may have its own unique operating system – a determination as to the operating system of the device is never made. Although Ciccone could include more than one operating system, the use of more than one operating system is not inherent and additional functionality would be required by Ciccone to accommodate more than one operating system. As such, the construction of claims 10 and 14 as being anticipated by Ciccone is clearly improper and should be **REVERSED**.

3. The Examiner has improperly construed claims 11 and 12 in rejecting them under 35 U.S.C. § 103(a) over Ciccone in view of Sandahl.

Claim 11 includes the method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a device setup command from the point of sale device.

In addition to the failure of Ciccone to disclose or teach the elements of claim 10 discussed above, Sandahl fails to cure the deficiency of Ciccone as it only teaches devices that initiate an update

request, as admitted by the Examiner at page 6, paragraph 23 of the Office Action mailed October 18, 2005. A device setup command is not a device update command – one of ordinary skill in the art would understand that setup and update are two different functions, not to mention that this difference is discussed in the specification at page 21, lines 14 through 32 – setup includes providing information, files, or other items that are not present on the point of sale system, whereas update only applies to information, files or other items that are associated with items that are already present on the point of sale system. It is further noted that the Examiner failed to address the Applicant's arguments regarding this claim term (i.e., “setup” versus “update”) in finally rejecting the claims, and should not be allowed to impose new grounds of rejection on appeal.

Claim 12 includes the method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a device update command from the point of sale device. As previously discussed, the programming request can come from any location, not just the point of sale system, so the Examiner's reliance on Sandahl merely underscores the improper rejection of claim 10 under 35 U.S.C. 102 over Ciccone, or even under 35 U.S.C. 103 over Ciccone in view of Sandahl. Furthermore, one of ordinary skill in the art would understand that a “device update command” of the claimed invention and an “update request” of Sandahl are two different things – it is not enough to merely rely on the similarity of selected words in the claim, the system functionality embodied by the claim must also be compared with the prior art. This is clear from consideration of the “managed devices” of Sandahl, which are network devices where “inter-operation of the devices with each other provides desired overall network system operation.” In such a network, devices request updates as to information about other devices in order to communicate. In contrast, the claimed invention does not relate to updating information in networked devices so as to allow communication with other networked devices, but rather to a point of sale device receiving programming updates in response to a command in order to allow the device to operate. As the Examiner has improperly construed the term “setup” to mean “update” and “device update command” to mean “networked device communication information update request,” these rejections must be **REVERSED**.

4. The Examiner has improperly construed claim 13 in rejecting it under 35 U.S.C. § 103(a) over Ciccone in view of Rogge.

Claim 13 includes the method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a polling command from a device update controller. The Examiner, again admitting at paragraph 27, page 7 of the Office Action mailed October 18, 2005 that Ciccone lacks a polling system or any other functionality that would satisfy the first element of claim 10, argues that Rogge discloses this claim element. However, upon reading the cited passage of Rogge at col. 12, lines 15-51, it is clear that it is the network and not the host that is performing the polling. The network of Rogge is unable to program a point of sale terminal, and additional functionality would need to be added to Rogge in order for it to perform that function, namely, the network would need to interface with the host when a polling command is sent, which is neither taught nor suggested by either Ciccone or Rogge. In any event, the functionality stated by the Examiner is not what is covered by claim 13 – “receiving the programming request for the point of sale device comprises receiving a polling command from a device update controller” makes it clear that the point of sale device does not have to send or receive the poll. The construction of this claim element adopted by the Examiner is simply incorrect, and the rejection must be **REVERSED**.

5. The Examiner has improperly construed claims 15 and 16 in rejecting them under 35 U.S.C. § 103(a) over Ciccone in view of Resende.

Claim 15 includes the method of claim 10 wherein transmitting the programming request to the point of sale device based on the operating system comprises transmitting the programming request over a public switched telephone network. Claim 16 includes the method of claim 10 wherein transmitting the programming request to the point of sale device based on the operating system comprises transmitting the programming request over an Internet. In addition to the failure of Ciccone to teach the elements of claim 10 discussed above, Resende not only fails to provide the missing teachings but also fails to disclose these additional elements. The sales point device of Resende, as shown in Figs. 3 and 7, is a large display case with items that can be purchased and removed from the display, and is not a point of sale device, which would be reasonably construed in light of the specification to be a limited functionality, limited purpose device used for capturing

data, such as from a payment card, and for transmitting the captured data to an authorization network. Resende teaches that a general purpose processor is required to control the functionality of the sales point display case – functionality well beyond that of a point of sale device. Claims 15 and 16 do not cover the PSTN or the Internet, as construed by the Examiner, but rather “transmitting the programming request over a public switched telephone network” and “transmitting the programming request over an Internet.” The programming request is a programming request for a point of sale device, which has limited computing functionality, not the general purpose computer of Resende. The Examiner’s improper construction of these elements results in an unreasonable, overly-broad construction that would be anticipated by almost any distributed network. The rejection of these claims should be **REVERSED**.

6. The Examiner has improperly construed claim 17 in rejecting it under 35 U.S.C. § 103(a) over Ciccone in view of U.S. 4,999, 766 (“Peters”).

Claim 17 includes a method for managing a plurality of point-of-sale devices comprising storing a file for each of a plurality of operating systems, where any of the operating systems can be associated with one or more of each point of sale device, each file containing device operating commands, retrieving one of the files in response to a programming request for a corresponding device after an operating system for the corresponding device has been determined, and transmitting the file to the corresponding device. The Examiner acknowledges that Ciccone does not disclose or teach retrieving files after an operating system for a corresponding point-of-sale device has been determined, but asserts that Peters discloses this functionality. However, it is clear from Peters that it has no applicability to point-of-sale systems – instead, it applies to a system that includes a host that “uses an installation technique common to most IBM systems that run on the Multiple Virtual Sessions (MVS) operating system,” as disclosed col. 1, lines 39 through 41, and acknowledged by the Examiner, as well as a host that uses the Virtual Machine (VM) operating system, as disclosed at col. 3, lines 51 through 52, and a plurality of workstations having an undisclosed and common operating system. Not only does Peters fail to disclose point-of-sale systems, each of which can have any one of a plurality of operating systems, Peters in fact is relevant only to a specific type of IBM system in which the MVS operating system and VM operating system are utilized on hosts for communication with workstations (not point of sale systems) having unspecified operating systems, as acknowledged by the Examiner at paragraph 32

of the Office Action mailed October 18, 2005. Claim 17, as unreasonably construed by the Examiner, improperly covers prior art IBM systems for “for maintaining consistent filename conventions between multiple hosts and workstations,” as disclosed in the abstract of Peters. This construction is improper – the invention of claim 17 is explicitly limited by the claim language to “a method for managing a plurality of point-of-sale devices comprising storing a file for each of a plurality of operating systems, where any of the operating systems can be associated with one or more of each point of sale device . . . [and] retrieving one of the files in response to a programming request for a corresponding device after an operating system for the corresponding device has been determined.” In Peters, the operating systems of the workstations are all identical (not a plurality) and known in advance (only one operating system can be associated with any given workstation). The Examiner’s construction is improper and must be **REVERSED**.

7. The Examiner has improperly construed claims 18 and 22 in rejecting them under 35 U.S.C. § 103(a) over Ciccone and further in view of Peters and further in view of Resende.

Claim 18 includes the method of claim 17 wherein storing the file for each of a plurality of operating systems comprises creating two or more classes of files for the point of sale devices based upon the proprietary operating systems used by the point of sale devices, creating at least one class of rules for the point of sale devices based upon the users of the point of sale devices, applying the class of rules to the two or more classes of files, and storing each file for each point of sale device. Claim 22 includes the “method of claim 10 wherein transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device further comprises determining that a change in a business entity has occurred for a point of sale device, selecting a template for the point of sale device, determining whether to modify the template to include changing a telephone number for the point of sale device based on the change in business entity, determining whether to modify the template to include changing a list of allowable cards based on the change in business entity, determining whether to modify the template to include changing a merchant number based on the change in business entity, determining whether to modify the template to include changing an address based on the change in business entity, determining whether to modify the template to include enabling program modules based on the

change in business entity, determining whether to modify the template to include disabling program modules based on the change in business entity, determining whether to modify the template to include enabling loyalty card programs based on the change in business entity, determining whether to modify the template to include disabling loyalty card programs based on the change in business entity, determining whether to modify the template to include enabling frequent buyer card features based on the change in business entity, determining whether to modify the template to include disabling frequent buyer card features based on the change in business entity, determining whether to modify the template to include modifying authorization host features in response to call swipes based on the change in business entity, and determining whether to modify the template to include modifying credit card reversal of transaction features based on the change in business entity. In order to support the rejection of these claims, the Examiner must “connect the dots” with three different references – Ciccone, Peters, and Resende. However, as previously discussed, neither Peters nor Resende deal with point-of sale-systems – they teach various systems relevant only to large, general purpose workstations. As such, construing these claims to be anticipated by a compilation of these varied references is improper, as only one of those references discloses point-of-sale systems, and the additional functionality required by Peters and Resend at the workstations or sales point computers would not be available at any conventional point-of-sale device, as one of ordinary skill in the art would understand that term.

Furthermore, the Examiner asserts that Resende teaches one class of rules, applying the class of rules to two or more classes of files, as to claim 18, and “a telephone number, a list of allowable cards, a merchant number, an address, program modules, disabling program, enabling loyalty, disabling loyalty cart [sic], enabling frequent buyer,” as to claim 22, citing to col. 6, ln. 36-67. As to claim 18, a text search of Resende reveals that it discloses neither the term “class” or “rule.” As to claim 22, the Examiner’s listing of what is allegedly disclosed by Resende is not only wrong, but is also a misconstruction of what is required by claim 22 – claim 22 includes the following limitations: “determining whether to modify the template to include changing an address based on the change in business entity, determining whether to modify the template to include enabling program modules based on the change in business entity, determining whether to modify the template to include disabling program modules based on the change in business entity, determining whether to modify the template to include enabling loyalty card programs based on the change in business entity, determining whether to modify the template to include disabling loyalty

card programs based on the change in business entity, determining whether to modify the template to include enabling frequent buyer card features based on the change in business entity, determining whether to modify the template to include disabling frequent buyer card features based on the change in business entity, determining whether to modify the template to include modifying authorization host features in response to call swipes based on the change in business entity, and determining whether to modify the template to include modifying credit card reversal of transaction features based on the change in business entity.” Even if Resende did disclose “a telephone number, a list of allowable cards, a merchant number, an address, program modules, disabling program, enabling loyalty, disabling loyalty card [sic], enabling frequent buyer,” as asserted by the Examiner, that disclosure in and of itself *prima facie* fails to anticipate the associated claim elements of claim 22. However, a simple word search of Resende reveals that it doesn’t even include the alleged words relied on by the Examiner as support for the rejection based on the improper construction. The following words are not even present in Resende – merchant, merchant number, disabling program, loyalty, loyalty card, and disabling loyalty card (or “card”). Furthermore, it is not clear why the Examiner also threw in “sales, profit margins . . . a cordless telephone, a backup power supply, a notebook computer” – all of these features are entirely irrelevant to the claimed invention. Any construction of claim 22 that covers a cordless telephone or a backup power supply is simply wrong.

8. The Examiner has improperly construed claims 19 and 20 in rejecting them under 35 U.S.C. § 103(a) over Ciccone in view of Peters and further in view of U.S. 6,311,165 (“Coutts”).

Claim 19 includes the method of claim 17 wherein retrieving one of the files in response to the programming request for the corresponding device comprises extracting a point of sale device identifier from the programming request; locating a data file associated with the point of sale device identifier; and retrieving the data file. While acknowledging that Ciccone and Peters do not teach a point of sale identifier (which is no surprise as to Peters, as it does not even disclose a point of sale device), or locating a data file associated with the point of sale identifier, the Examiner asserts that “Scotts” discloses these elements at col. 22, lines 9 through 67, apparently equating a peripheral’s “Mac” address with the point of sale device identifier and an operating system with the data file

associated with the point of sale identifier. Assuming that the Examiner was actually referring to “Coutts” and not “Scotts,” the peripherals of Coutts do not include point-of-sale terminals, but rather card readers, receipt printers, cash dispensers and user interfaces, all connected to a server 334 through a router 368. While a point-of-sale terminal may contain a card reader, it does not include a router or cash dispenser, and does include additional systems, such as ones that interface with credit card authorization systems to transmit data to the authorization system in a predetermined format and to receive an authorization response and generate an indication to the operator to determine whether the charge was accepted or declined. As such, the Examiner’s construction of Coutts as disclosing a point-of-sale terminal is improper.

Furthermore, it is clear from the cited section of Coutts that the MAC address is used to identify the address of peripheral and the server – instead of disclosing “extracting a point of sale device identifier from the programming request; locating a data file associated with the point of sale device identifier; and retrieving the data file,” Coutts discloses that “the peripheral can access the server 334 and download an operating system.” No point of sale device identifier is extracted, no data file associated with the point of sale device identifier is located, and no data file is retrieved. One of ordinary skill in the art would never construe a data file to be an operating system – one simply cannot operate a processor using a “data file.” The Examiner’s strained construction, concocted to allow the Examiner to assert that claim 19 is anticipated by Coutts, is wrong and must be **REVERSED**.

Claim 20 includes the method of claim 17 wherein retrieving one of the files in response to the programming request for the corresponding device further comprises receiving the programming request from the point of sale device. The Examiner relies on the same section of Coutts for this rejection as claim 19, but just as a data file is not an operating system, a file of device operating commands is also not an operating system. The Examiner conveniently uses Coutts to support either construction, but only one can be correct. In any event, claim 20 is allowable for no other reason than it depends from claim 17, which is allowable when properly construed. The rejection of claim 20 must also be **REVERSED**.

9. The Examiner has improperly construed claim 21 in rejecting it under 35 U.S.C. § 103(a) over Ciccone in view of Peters, in view of Resende, and further in view of Admitted Prior Art.

Claim 21 includes the method of claim 10 wherein transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device further comprises selecting a template for the point of sale device and imposing configuration constraints on the templates based upon a type of credit card that is used at the point of sale device. The Examiner acknowledges that these features are not disclosed in Ciccone or Peters, but construes 1) “selecting a template for the point of sale device” as “reevaluating market strategy,” and 2) “imposing configuration constraints on the templates based upon a type of credit card that is used at the point of sale device” as “transactions reports for each of the various sales points 12 may be utilized by the control center for reevaluating market,” Office Action mailed October 18, 2005 at paragraph 40. These constructions are simply absurd. How is “reevaluating market strategy” even remotely related to “selecting a template for the point of sale device?” How is “transactions reports for each of the various sales points 12 may be utilized by the control center for reevaluating market” remotely related to “imposing configuration constraints on the templates based upon a type of credit card that is used at the point of sale device?” If words have any meaning at all, there is simply no basis for construing the elements of claim 21 in this manner to support rejecting them over the cited sections of Resende. It appears that the Examiner merely uses Resende as a general purpose rejection reference – “it discloses cordless phones and backup power supplies, so everything else is just obvious.” However, that is not the standard by which the claims are to be construed. The Examiner’s construction is flawed, and must be **REVERSED**.

VIII. APPENDIX OF CLAIMS (37 C.F.R. 41.37(c)(viii))

The text of the claims involved in the appeal are:

1. A system for programming point of sale devices comprising:
device programming means for programming a plurality of point of sale devices;
communications interface means coupled to the device programming system, the communications interface means for receiving update requests from the plurality of devices; and
wherein the plurality of devices includes devices having proprietary operating systems from two or more different manufacturers.
2. The system of claim 1 wherein the device programming means further comprises device update file means for each of the plurality of point of sale devices.
3. The system of claim 1 wherein the device programming means further comprises device update file means for each of a plurality of classes of point of sale devices.
4. The system of claim 1 wherein the device programming means further comprises polling means for polling each of the point of sale devices.

Claims 5 and 6 (cancelled).

7. The system of claim 1 wherein the device programming means further comprises device setup means for setting the plurality of point of sale devices for use.
8. The system of claim 1 wherein the device programming means further comprises device update means operable to provide configuration data updates to the plurality of point of sale devices.
9. The system of claim 1 wherein the device programming means further comprises device analytical means for performing troubleshooting for the plurality of point of sale devices.

10. A method for programming point of sale devices comprising:
receiving a programming request for a point of sale device;
determining which of two or more proprietary operating systems is used by the point of sale device; and
transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device.
11. The method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a device setup command from the point of sale device.
12. The method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a device update command from the point of sale device.
13. The method of claim 10 wherein receiving the programming request for the point of sale device comprises receiving a polling command from a device update controller.
14. The method of claim 10 wherein determining which of two or more proprietary operating systems is used by the point of sale device comprises retrieving a file associated with the point of sale device.
15. The method of claim 10 wherein transmitting the programming request to the point of sale device based on the operating system comprises transmitting the programming request over a public switched telephone network.
16. The method of claim 10 wherein transmitting the programming request to the point of sale device based on the operating system comprises transmitting the programming request over an Internet.
17. A method for managing a plurality of point-of-sale devices comprising:
storing a file for each of a plurality of operating systems, where any of the operating systems can be associated with one or more of each point of sale device, each file containing

device operating commands;

retrieving one of the files in response to a programming request for a corresponding device after an operating system for the corresponding device has been determined; and

transmitting the file to the corresponding device.

18. The method of claim 17 wherein storing the file for each of a plurality of operating systems comprises:

creating two or more classes of files for the point of sale devices based upon the proprietary operating systems used by the point of sale devices;

creating at least one class of rules for the point of sale devices based upon the users of the point of sale devices;

applying the class of rules to the two or more classes of files; and

storing each file for each point of sale device.

19. The method of claim 17 wherein retrieving one of the files in response to the programming request for the corresponding device comprises:

extracting a point of sale device identifier from the programming request;

locating a data file associated with the point of sale device identifier; and

retrieving the data file.

20. The method of claim 17 wherein retrieving one of the files in response to the programming request for the corresponding device further comprises receiving the programming request from the point of sale device.

21. The method of claim 10 wherein transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device further comprises:

selecting a template for the point of sale device; and

imposing configuration constraints on the templates based upon a type of credit card that is used at the point of sale device.

22. The method of claim 10 wherein transmitting the programming request to the point of sale device based on the proprietary operating system used by the point of sale device further comprises:

determining that a change in a business entity has occurred for a point of sale device;

selecting a template for the point of sale device;

determining whether to modify the template to include changing a telephone number for the point of sale device based on the change in business entity;

determining whether to modify the template to include changing a list of allowable cards based on the change in business entity;

determining whether to modify the template to include changing a merchant number based on the change in business entity;

determining whether to modify the template to include changing an address based on the change in business entity;

determining whether to modify the template to include enabling program modules based on the change in business entity;

determining whether to modify the template to include disabling program modules based on the change in business entity;

determining whether to modify the template to include enabling loyalty card programs based on the change in business entity;

determining whether to modify the template to include disabling loyalty card programs based on the change in business entity;

determining whether to modify the template to include enabling frequent buyer card features based on the change in business entity;

determining whether to modify the template to include disabling frequent buyer card features based on the change in business entity;

determining whether to modify the template to include modifying authorization host features in response to call swipes based on the change in business entity; and

determining whether to modify the template to include modifying credit card reversal of transaction features based on the change in business entity.

IX. EVIDENCE APPENDIX (37 C.F.R. 41.37(c)(ix))

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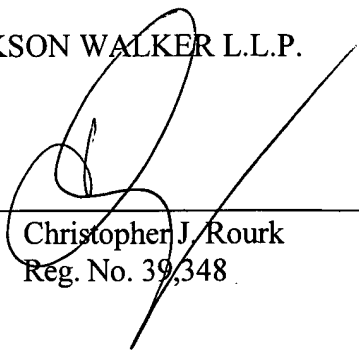
X. RELATED PROCEEDINGS APPENDIX (37 C.F.R. 41.37(c)(x))

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Dated: 8/17/06

Respectfully submitted,

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